IN THE

Supreme Court of the United States

October Term 1940.

No. 987

SABINE TOWING COMPANY, INCORPORATED,

Petitioner,

versus

CONTINENTAL INSURANCE COMPANY, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

M. A. GRACE,
EDWIN H. GRACE,
DANIEL H. GRACE,
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Counsel for Petitioner.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Sabine Towing Company, Inc., petitioner (plaintiff and appellee below), respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Fifth Circuit to review the decree of that

Court entered February 7, 1941 (R. 615) Reported in 117 F. 2d 694, reversing the decree of the District Court of the United States for the Eastern District of Texas entered on April 2, 1940, and wherein the District Court, sitting without a jury, in a case at law, awarded judgment in favor of petitioner against respondent on two certain Protection and Indemnity policies of insurance.

STATEMENT OF THE CASE.

This litigation was commenced by petitioner herein instituting an action at law in the United States District Court for the Eastern District of Texas against respondent to recover the amount paid by petitioner on judgments recovered against petitioner in litigation growing out of the sinking of petitioner's tug "Edgar F. Coney" in the Gulf of Mexico as a result of which the entire crew of this tug was lost. In addition to judgments and costs, petitioner also claimed the cost incurred in the defense of the claims resulting in judgments against petitioner herein. The amount claimed by petitioner herein against respondent was in the total sum of Seventy Thousand One Hundred Two and 41/100 ($70,102.41) Dollars, this amount being claimed under two certain policies of Protection and Indemnity insurance issued by respondent to petitioner, and which policies, according to their terms, insured petitioner as owner of the tug "Edgar F. Coney" "* * * against their losses resulting from liability as shipowners". It was further provided in said policies as follows:

> "This company hereby undertakes to make good to the assured * * * all such losses and/or damages

and/or expense as the assured shall, without fault or privity on the part of the assured, become liable to pay and shall pay, not exceeding the amount of this policy on account of liabilities, risks, events, happenings and/or occurrences herein set forth.

"Protection and Indemnity Risks.

"Protection.

"(a) For * * * loss of life or personal injury caused to any person being carried in * * * the vessel named herein."

The law costs were claimed under a separate provision of the policies which provided for the reimbursement thereof to the assured where the claims were defended with the written consent of the respondent.

Petitioner's tug, "Edgar F. Coney", so covered by insurance, sank in the Gulf of Mexico, resulting in the loss of the lives of her crew, and at a time when the policies were in full force and effect. That subsequent thereto, personal representatives of the deceased members of the crew filed suits against petitioner in the State Court claiming damages in the total sum of Two Hundred Fifty Thousand ($250,000.00) Dollars. That with written consent of respondent herein these claims were defended by petitioner. That in the defense of these claims the petitioner herein, and as permitted under Revised Statutes 4282-4283, 46 USCA 183-185, filed in the United States District Court for the Eastern District of Texas, (the same court in which the instant action at law was filed), its petition for exoneration from or limitation of liability. That various death claimants appeared and filed claims

and answers in said proceedings, and wherein the question of petitioner's liability for such loss of life claims was adjudicated. The District Court, in that proceeding, decreed that petitioner was not entitled to exoneration from or limitation of liability for said loss of life claims. That on appeal by petitioner to the United States Circuit Court of Appeals the decision of the lower Court, denying petitioner's prayer, was affirmed, Circuit Judge Foster dissenting on the ground that in his opinion the case was one for limitation of liability.

That subsequent to the affirmance of the judgment of the lower Court, final judgments were entered fixing claimants' recovery herein in the sum of approximately Sixty-one Thousand ($61,000.00) Dollars.

Petitioner herein claimed from respondent reimbursement up to Forty Thousand ($40,000.00) Dollars, the total amount of the liability provisions of the policies plus costs of defense covered by a separate provision of the policy making up its claim against petitioner in the aforesaid sum of Seventy Thousand One Hundred Two and 41/100 ($70,102.41) Dollars.

The defense urged by respondent to the payment of this claim was as follows:

(1) That as the Court, in the limitation of liability proceeding, had denied to petitioner its prayer for exoneration from or limitation of liability and that under the clause of the policy hereinabove quoted under which respondent agreed to make good to the assured all losses, damage, and expense that the assured "shall, without fault

or privity on the part of the assured, become liable to pay, etc.," respondent urged that it bound itself only to such risks as occurred "without the privity or knowledge of the assured". Respondent contended that by reason of the judgments in said cause (referring to the said limitation of liability proceeding) the question of privity and knowledge of the plaintiff to the unseaworthiness of the tug "Edgar F. Coney" having been adjudicated against the plaintiff and pleaded the same as *res adjudicata* that the loss occurred not with the "privity or knowledge" of petitioner, but with the "fault or privity" of petitioner as excepted under the policies.

This defense, in other words, is that a mere denial of a shipowner's statutory right to limit his liability, based on a finding that the loss occurred with the shipowner's "privity or knowledge", as said term is used in said proceeding under the statute (46 USCA 183), was a finding of "fault or privity on the part of the assured" within the meaning of those words as used in a Protection and Indemnity insurance policy secured by the assured and for which it paid a premium.

As an alternative defense it alleged that if liable herein, its liability for death claims and law costs combined should not exceed Forty Thousand ($40,000.00) Dollars. It is not denied herein that if the District Court was correct in allowing law costs in addition to $40,000.00 the total amount awarded is correct.

The District Judge found against respondent on both of its contentions and entered a judgment against respondent for the full amount claimed herein.

The trial in the District Court was had as an action at law before the Judge without a jury.

On the trial of this case plaintiff offered in its behalf the testimony of six of the most outstanding American Insurance men. Five of these witnesses testified by deposition some sixty days before the day of the trial. The sixth witness, an outstanding insurance man, and the president of plaintiff company also testified in open court.

The American witnesses produced on behalf of plaintiff and testifying with respect to an American insurance policy testified that the words "fault or privity" as used in the insurance trade have a general, accepted, peculiar, or characteristic meaning and unlike the words privity or knowledge as used in the statute were confined to a deliberate, intentional or wrongful act, or negligence so gross as to amount to such. These witnesses so testifying consisted of the following: LaBoyteaux, in the insurance business since 1899 and, at the time of testifying, president of Johnson-Higgins Insurance Brokers in New York (R. 480, 484); Knowles, with 31 years' experience in the insurance business and, at the time of testifying, vice-president and head of the Insurance Department of C. D. Mallory & Co., Inc., (R. 506, 508); Sullivan, who had handled P. & I. policies since 1920 and, at the time of testifying, was with Frank B. Hall & Co. (R. 519, 537); Stillman, with 40 years' experience in the insurance business during all of which time he was with Mathers, Ltd., Insurance Broker (R. 532); Neville, with 30 years' experience with P. & I. policies and, at the time of testifying, manager of the Adjusting Department of Marsh-

McLennen Insurance Brokers and Average Adjusters (R. 543, 545); Gore, 20 years' experience with P. & I. policies and who, at the time of testifying, was a Director of Francis C. Carr & Co. (R. 215, 303); Ball, president of petitioner company and who, in his position with that company, handled P. & I. policies in large amounts since 1905 (R. 36, 46).

Ball also testified (R. 46):

> "Q. And from your experience and investigation with respect to placing this large amount of insurance that you have placed, have you discussed with brokers and insurance men the application applied to the words fault or privity in the insurance business?
>
> "A. I did.
>
> "Q. And what did you find to be that application?
>
> "A. That I would be afforded that protection except for losses resulting from wrongful acts, intentional acts or intent.
>
> "By the Court:
>
> "What was meant by wrongful acts?
>
> "By the Witness:
>
> "An act in which I had knowledge of its unseaworthiness prior to the accident and permitted it to continue."

This testimony given by the president of petitioner as to the extent of the coverage stands without contradiction.

To the testimony as to the meaning of the words "fault or privity" as used in the insurance business defendant entered a general objection. The substance of this objec-

tion was that the words "fault or privity" had an established legal meaning and that parol evidence that these words as used in the policies had a characteristic meaning in the insurance trade was inadmissible; that there was no ambiguity; and that the said words must be taken and understood in their plain, ordinary meaning. The objections appear at R. pp. 363, 365, and were overruled R. 366.

Notwithstanding that these objections had been overruled and although, for some two months before the trial, defendant had in its possession the testimony of five of plaintiff's witnesses, defendant in its behalf and on the day of trial produced only two witnesses, both insurance men, but neither of whom made any attempt to contradict the testimony offered on behalf of plaintiff, but rested its case on the testimony of the aforesaid two witnesses produced in its behalf. That several weeks after the submission of the case, and with same under consideration by the District Judge, respondent applied for and secured an order reopening the case to permit it to take further testimony, not of American Insurance witnesses with respect to the meaning of certain words as used in an American insurance policy as involved, but of English insurance men residing in London, England. In this motion to reopen the case, and which appears at R. 554, it is in part stated:

> "The defendant further shows that the aforesaid witnesses are General Managers of three of the largest Protection and Indemnity Associations existing, and are fully prepared to testify, if it is admissible, as to the construction given, in the Insurance world to the words 'Fault or Privity' of the owner. The defendant is informed and believes that said wit-

nesses will testify that no such construction as that contended for by the plaintiff has ever been given the words 'Fault or Privity', but that the same are used and construed in their usual and ordinary sense and are given the same construction as the similar words used in the limitation of liability statutes of England and America, and that all of said witnesses will testify that they have been connected with and have been Managers of Protection and Indemnity Societies for many years, and have never known of, or been informed of the construction of said words contended for by plaintiff."

In due course this testimony was taken in London, and five witnesses were examined on behalf of defendant. We pause here to point out that one of said witnesses, so testifying for defendant, and who had fifty years experience with Protection and Indemnity policies, at page 592, on direct examination, testified as follows:

"Q. It has been testified in this case that the words 'fault or privity' are confined to intentional, deliberate or wilful acts of the shipowners; have you heard of any such meaning?

"A. Yes, I think that is the general meaning of them."

The testimony of the five English witnesses was offered in evidence on behalf of defendant.

With the testimony of the American witnesses, who testified on this question for plaintiff, and that of the English witnesses, who testified on behalf of the defendant, the Court, sitting without a jury, and considering an American insurance policy, rendered a memoranda opin-

ion, and which was subsequently embodied in formal findings of fact and conclusions of law. The court found for petitioner for the full amount claimed.

OPINIONS BELOW.

The memoranda opinion of the District Judge appears at R. 619. His findings of fact and conclusions of law at R. pp. 598, 606. The majority opinion of the United States Circuit Court of Appeals appears in the R. p. 634. The dissenting opinion of Circuit Judge McCord appears at R. p. 646.

In the memoranda opinion of the District Judge, he, in part, states:

> "After much consideration of the above entitled matter, I am of the opinion that plaintiff is entitled to recover the full amount claimed under the policies in question as the negligence of the owners of the vessel was not so gross as to amount to a wilful, deliberate, and intentional wrong, which is the only kind of negligence that would, in my opinion, avoid liability under the policies in question * * *."

The Court further found that the prior litigation in the limitation of liability proceeding was conducted with the written consent of defendant and that plaintiff was, under the said policies, entitled to costs and expenses incurred in defending the claims.

In his findings of fact (R. 604) the District Judge, in referring to his findings in the limitation of liability proceeding, further found herein:

"IV.

> "I find that the negligence of plaintiff herein, as found in said limitation of liability proceedings, and upon which plaintiff herein, petitioner therein, was found liable and denied the right of limitation of liability under R. S. 4283-4285, was not deliberate, or intended, or gross in character, and that plaintiff herein, became liable to pay, and did, pay for the said loss of life, without fault or privity on the part of plaintiff herein within the meaning of the two said policies of protection and indemnity insurance hereinabove referred to."

The District Court's finding herein as above quoted is based on facts in the limitation of liability proceeding which established without contradiction, that some ninety days before the loss of the tug, she was purchased by petitioner for Thirty Thousand ($30,000.00) Dollars, and at the time of her purchase and for some ten years prior thereto, she had safely and successfully operated in the Gulf of Mexico and Atlantic Ocean. That after the purchase of said tug, petitioner, in the repair and alteration thereof under the supervision of the United States Local Inspectors and in doing everything they and the said inspectors deemed necessary to make her a good, staunch and seaworthy tug, spent in said repair the sum of Twenty Thousand ($20,000.00) Dollars. After the repairs the United States Local Inspectors issued to said tug a Certificate of Inspection as to seaworthiness, and for about

thirty days before her loss she had been successfully and safely operated in the service of petitioner. Notwithstanding this fact, the lower Court and the majority opinion of the United States Circuit Court of Appeals in the limitation of liability proceedings found the vessel unseaworthy, and that this unseaworthiness caused the loss. Neither Court found that petitioner, prior to the loss, knew that the vessel was unseaworthy. On the contrary they found that the petitioner had no knowledge of what the Court found to be unseaworthiness. The findings of liability was based on a holding that there was a non-delegable duty on the part of petitioner to the crew to furnish a seaworthy tug and, having breached this duty, petitioner was liable irrespective of negligence. The Court imputed to petitioner knowledge of this unseaworthiness and therefore held that the petitioner had not shown that the loss had not occurred without their privity or knowledge, and on said finding, denied to petitioner the Statutory right to exoneration from or limitation of liability. The opinion of the District Court and the United States Circuit Court of Appeals in the limitation of liability proceeding was offered in evidence by respondent herein and appears at (R. 619) and (R. 440).

In the dissenting opinion of Circuit Judge McCord herein and referring to the record in the limitation of liability proceeding, in part says:

> "No contention is made in this case that appellee was guilty of wanton or wilful misconduct. So far as the record discloses the insured was honest and forthright in and about its business. At most it was guilty of simple negligence and bad judgment. For

> this dereliction this court has heretofore decreed that it must pay out large sums for the loss of seamen who were on the tug. Now it is told by the majority opinion that since it was guilty of simple negligence and bad judgment it may not recover the amount of insurance it carried on the vessel."

In the majority opinion herein of the United States Circuit Court of Appeals in the instant case, the Court in referring to the oral testimony offered on behalf of plaintiff, and which was offered to show that in the insurance world the words "fault or privity" as used in the policies had a well-understood meaning different from the dictionary or popular meaning, in part says:

> "Its reliance on oral testimony will not do, for in the case of the use in insurance policies or other contracts of words like these, having a plain and settled meaning in both popular and legal usage, oral testimony is inadmissible to contradict or vary that meaning."

Circuit Judge McCord in his dissenting opinion herein (R. 646) in part says:

> "I do not agree that the words 'fault or privity' have a 'plain and settled meaning in both popular and legal usage'. There seem to be no decisions construing the same or similar language in policies of marine insurance and I think the oral testimony of qualified witnesses, such as was offered in this case, was admissible to show that the words 'fault or privity' have a recognized and well-understood meaning among underwriters and their customers, and that this characteristic meaning is different from the ordinary dictionary definition. Policies of insurance, like

other contracts, are to be construed to give effect to the intention of the parties and 'In examining, for the first time, any question under a policy of insurance, it is necessary to ascertain whether the contract has received a practical construction, by merchants and underwriters.' General Mutuai Ins. Co. v. Sherwood, 14 How. 351, 352, 362; Western Petroleum Co. v. Tidal Gasoline Co., 7 Cir., 284 F. 82; Daniel v. Pappas, 8 Cir., 16 F. 2d 880; The Svartfore, D. C., 38 F. 2d 874; New Roads Oilmill & Mfg. Co. v. Kline, 5 Cir., 154 F. 296; Duer on Marine Insurance, Vol. 1, p. 187."

Judge McCord, in referring to the testimony of witnesses who testified on behalf of plaintiff, in part, further states (R. p. 647):

"W. Harvel LaBoyteaux, President of Johnson & Higgins, insurance brokers of New York, with a background of over fifty years in the insurance business, testified that he was familiar with 'fault or privity' clauses in 'P. & I. policies, and that P. & I. insurers have generally interpreted the clause in the policy or club rules as applying only if the owner has knowingly and wilfully tolerated or permitted conditions so dangerous as to practically amount to moral turpitude.'

"Ellis Knowles, Vice-President and head of the Insurance Department of C. D. Mallory & Co., Inc., and who had been in the insurance business for thirty-one years, testified that the words 'without fault or privity' have a generally accepted meaning in the insurance business and that, 'If an owner is deliberately crooked * * *—guilty of moral turpitude—then a P. and I. underwriter should not reimburse the owner, but if an owner is innocent of any intent or wrongdoing,

the P. and I. underwriter should not hide behind any technicality in either the law or the policy.'

"Arthur J. Sullivan, who had been an Average Adjuster since 1917, testified that he was familiar with P. & I. policies containing 'fault or privity' clauses; that the words 'without fault or privity' have a generally accepted, 'peculiar or characteristic meaning' in the insurance business; and that, 'The meaning is that when a loss has been sustained through the deliberate and wilful act of the assured, the underwriters shall be relieved of liability. * * * I think the words must be given a particular meaning, because if they are taken in their ordinary dictionary sense that will entirely destroy the effect of the policy, because the functions of a P. and I. policy is to protect the owner from losses that may arise through somebody's negligence in connection with the operation of steamships. That is the essential purpose of the policy. There is also a fault in the P and I. claim, and if we exclude every claim in which there may be a fault we, in effect, completely destroy the purpose of the policy, and some sense must be given to these words of the policy, and they cannot be construed in a way that will entirely destroy the policy. Q. And the construction you have given us is what you consider their meaning, generally, in the insurance business to be? A. Yes.'

"Testimony of other witnesses for the appellee is to the same effect. This evidence shows that in the insurance business it is generally understood that for the underwriter to escape liability because of the 'fault or privity' provision the negligence of the owner must measure to wilful, deliberate, or intentional wrong."

There is therefore involved herein a distinct and contrary ruling of law as to the interpretation of contracts, especially insurance contracts, and a distinct and contrary holding as to the meaning of the controlling words in the policy, "fault or privity", wherein two Circuit Judges differ from another Circuit Judge of their Court, and from the District Judge who tried and decided the case in the District Court in an action at law sitting without a jury.

QUESTIONS PRESENTED.

1. Are the words "fault or privity" as used in a contract of Protection and Indemnity policy of insurance, a contract by a paid insurer to relieve its promisee of loss, to be given the same meaning as that given by the Courts in interpreting the words "privity or knowledge" as used in the Shipowners Limitation of Liability Statute (R. S. 4283-4285) (46 USCA 183-185), so that when a shipowner in such a limitation of liability proceeding is denied the statutory right to limit his liability, is he to be denied the right to recover under said insurance policy of Protection and Indemnity?

2. Can the words "fault or privity" as used in Protection and Indemnity policies of insurance be held to have a plain and settled meaning in both popular and legal sense and a meaning contrary to what witnesses, long experienced with such policies including such words, testify that they have in the insurance trade to which the contract applies?

3. Is not parole testimony admissible to establish the settled construction given by the insurance trade to the words "fault or privity" in insurance policies, as differing from the natural import of the words, and should not such meaning be sanctioned by the Court?

THE REASONS RELIED UPON FOR GRANTING THE WRIT.

The reasons for which this petitioner asks that a writ of certiorari be issued are as follows:

1. The question presented is the interpretation of a Protection and Indemnity policy, the object of which is to afford protection to shipowners, in addition to that afforded by the ordinary marine policy. The question was submitted for judicial determination for the first time, wherein the Circuit Court of Appeals for the Fifth Circuit, with one Judge dissenting, reversed the Judge of the District Court with the result that the case was decided by an equal division of Judges within the Circuit pertaining to the construction of an important commercial contract, and that construction adopted by the majority opinion, in holding that the interpretation as placed thereon by the business world is inadmissible, is contrary to what this Court has said with respect to such contracts. In *Peters v. Warren Insurance Co.*, 14 Peters 99, this Court said:

> "If there be any commercial contract which more than any other requires the application of sound common sense and practical reasoning in the exposi-

> tion of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance, for it deals with the business of common men who are unused to deal with abstracts of refined distinctions."

And the Fifth Circuit Court of Appeals is also in conflict herein with the Eighth Circuit Court of Appeals, which court, in *E. I. DuPont de Nemours & Co. v. Claiborne-Reno Co.*, 64 F. (2d) 224, said:

> "Contracts are ordinarily to be performed by business men and should be given the interpretation to be placed upon them by the business world."

2. The Circuit Court for the Fifth Circuit in holding that parole testimony was inadmissible to show the meaning of the term used in the policy, as acquired by custom and usage of the insurance trade, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit, in *Daniel v. Pappas*, 16 F. (2d) 880, wherein that court said:

> "In the construction of mercantile contracts, parol evidence is admissible to show that the terms used therein have acquired, by the custom of the locality or the usage of the trade, a peculiar significance; and this is true, although the terms used may not in themselves appear to be ambiguous. Such evidence does not contradict the contract, but simply applies them to the subject matter."

3. The Circuit Court of Appeals for the Fifth Circuit also rendered its decision in conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit in the

case of *Western Petroleum Company v. Tidal Gasoline Company*, 284 Fed. 82, wherein that court said:

> "It is an elementary principle of judicial interpretation that the test to be applied is what the ordinary user of the language would understand the words under the circumstances to mean, Holmes, 'The Theory of Legal Interpretation,' 12 H. L. R. 417. Another familiar principle of construction provides that, while the standard of ordinary usage is prima facie the one to be applied, it is nevertheless competent to show that in point of fact in the particular trade to which the contract has reference the words to be construed have a peculiar and special trade meaning, and the parties, being members of that trade, must have understood the words in that special sense. Wigmore on Evidence, §§2463, 2464; Willingston on Contracts, §850."

4. Because of the importance of the question involved herein, a question of law, and in view of the fact that the question herein presented is for the first time squarely put before the courts, the majority opinion stated "* * * we have been referred to no cases construing these words when used in a policy * * *"; and as stated in the dissenting opinion "there seem to be no decisions construing the same or similar language in policies of marine insurance".

And as stated in *The Morro Castle*, 117 F. (2d) 404 (decided by the Circuit Court of Appeals for the Second Circuit on January 27, 1941, a suit on a protection and indemnity policy and in which we are informed an application for writ of certiorari is being made to this Honorable Court) "There seem to be no explicit decisions to guide us

as to the meaning of the crucial words in the policy"; and with respect to which words as used in the statute, the Circuit Court of Appeals in the instant case in its majority opinion, said:

> "We think it plain that they have the same meaning and effect when used in the policies in suit."

In the dissenting opinion herein Judge McCord took a contrary view, saying:

> "The words 'fault or privity' as used in the policy of insurance should not be limited to the interpretation placed upon similar language used in the American and English limitation of liability statutes."

And as stated in *The Morro Castle* case:

> "* * * the analogy between the statutory provision for limited liability and a contract by a paid insurer to relieve the promisee of loss should not be pressed too far."

That therefore this Honorable Court should, in the public interest, grant the writ herein to the end that it may decide this question; one of widespread public importance, and on which there is a diversity of opinion.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify and to send to this Court, for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in

the cause numbered and entitled on its Docket No. 9547, Continental Insurance Company, Inc., Appellant, vs. Sabine Towing Company, Inc., Appellee; and that said judgment of the Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just;

And your petitioner will ever pray.

SABINE TOWING COMPANY, INC.,
Petitioner,

By M. A. GRACE,
EDWIN H. GRACE,
DANIEL H. GRACE,
JOHN D., M. A. & EDWIN H. GRACE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The memorandum opinion of the District Court holding your petitioner entitled to recover under the Protection and Indemnity policy is not reported, but is found at pages 619-620 of the record. The findings of fact and conclusions

of law are reported in 1940 A. M. C. 524. The opinion of the Circuit Court of Appeals reversing this opinion is reported in 117 F. (2d) 694.

II.

Jurisdiction.

The jurisdiction of this Court is involved under Sec. 240 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stats. 938; 28 USCA Section 347, page 359). The date of the decree of the Circuit Court of Appeals now sought to be reviewed is February 7, 1941 (R. 634).

III.

Statement of the Case.

The essential facts of the case are fully set forth in the accompanying petition for certiorari and, in the interest of brevity, are not repeated here.

IV.

Specifications of Error.

The Circuit Court of Appeals for the Fifth Circuit erred:

(1) In reversing the decree of the District Court;

(2) In not affirming the decree of the District Court;

(3) In holding that the words "fault or privity", as used in Protection and Indemnity policies, have the same

meaning as the words "privity or knowledge", as used in the Limitation of Liability Statute (46 USCA 183);

(4) In not holding that the words "fault or privity", as used in Protection and Indemnity policies, had a distinct and contrary meaning from the words "privity or knowledge" as used in the Limitation of Liability Statute (46 USCA 183);

(5) In holding that parole testimony of qualified witnesses that the words "fault or privity", as used in Protection and Indemnity policies, have a peculiar, characteristic, and recognized and well-understood meaning in the insurance trade, and the meaning so understood in such trade, was inadmissible;

(6) In not holding that the words "fault or privity" as used in the Protection and Indemnity policies meant fraud, or wilful, deliberate and intentional wrong, or negligence so gross as to amount to such, as qualified witnesses herein testified was the meaning thereof as recognized and understood in the insurance trade.

V.

Argument.

It is respectfully submitted that there arises herein an important question of law, that is the interpretation to be given a commercial contract, and one which is of extreme importance, an insurance policy covering liabilities of shipowners. In this case the District Court gave certain controlling words, "fault or privity", in the policies

the meaning that qualified witnesses testified was the meaning as was well understood in the insurance trade, and held petitioner could recover under the policies. One Circuit Judge, on appeal, agreed with the District Judge, and so interpreted the words in the policy. Two other Circuit Judges, constituting the majority of the Court sitting, gave the policy a contrary meaning than given by the District Judge and one Circuit Judge, and in so interpreting said words, held that the words had a plain and settled meaning in both popular and legal usage. That the majority court of the Circuit Court of Appeals, in giving these words such contrary meaning than given by the District Judge, held that the meaning so given by them was the same as the meaning given to the words "privity or knowledge" as used in the Limitation of Liability Statute (46 USCA 183), and therefore the assured being denied limitation under the statute was estopped from recovering under the policies. This, as stated, was contrary to the meaning as given by all American insurance men, well-qualified to testify, produced by petitioner, and also contrary to one witness, an English witness, produced by respondent.

The majority opinion has given the words "fault or privity" as used in Protection and Indemnity policies the same meaning the court says is given to the words "privity or knowledge" under the Limitation of Liability Statute (46 USCA 183). The majority opinion attempts to trace the derivation of these words to the English Limitation of Liability Statute, and which used the words "actual fault or privity", and contends that the words used in the American Statute of Limitation using the words "privity

or knowledge" have the same meaning, and that the words "fault or privity" as used in the policies are to be given the same meaning as given to the words "privity or knowledge" as used in the American Limitation of Liability Statute. The majority opinion bases their interpretation of these words, in particular, on the language used in the English decision of *Asiatic Petroleum, Ltd. v. Leonards,* Aspinall's Reports of Maritime Cases, Vol. 12, N. S. 381, a decision under the English Limitation of Liability Statute; but the majority opinion failed to consider the English decision of *Trinder Anderson & Co. v. Thames & Mersey Marine Ins. Co.,* Aspinall's Reports of Maritime Cases, Vol. 8, N. S. 373, wherein was involved an insurance claim. In this latter case the court pointed out that policies of insurance covered loss through accidental character, as distinguished from loss occasioned through the wilful act of the assured. This is the meaning given by all witnesses for petitioner, all well-qualified to give such testimony, and whose qualifications so to do were in no manner questioned by counsel for respondent or either court. The same meaning was given by one of respondent's English witnesses, a witness with over fifty years' experience in the insurance trade.

The majority opinion of the Circuit Court herein, in so construing the words, not only did not consider the parole testimony as to the meaning of these words in the insurance trade, but did not give effect to the purpose and object of the Limitation of Liability Statute as distinguished from the purpose and object of Protection and Indemnity insurance.

In *Hanover Fire Ins. Co. v. Merchants' Transportation Co.*, 15 F. (2d) 946, cert. den. 273 U. S. 758, the Circuit Court of Appeals for the Ninth Circuit, as to the purpose and object of a Protection and Indemnity policy, said:

> "The object of this form of insurance is to afford protection to shipowners, in addition to that afforded by the ordinary marine policy, and the contract should be construed with that object in view. When so construed, we are clearly of the opinion that it covered damages paid for loss of life arising from the negligence of the ship or shipowner; for, in the absence of negligence on the part of either, there would be no loss or liability to be indemnified against. And, if the policy covered loss arising from negligence, the Courts will not attempt to distinguish between the different kinds of degrees of negligence, unless, as agreed by counsel, the negligence was so gross as to amount to a wilful, deliberate, and intentional wrong.
>
> "Negligence of the latter class would constitute fraud as against the company. * * *"

And in the same opinion the Court further said:

> "The right of common carriers, shipowners, contractors, physicians and surgeons, and others to protect themselves by insurance against losses arising from their own neglect, is no longer open to question; for, as said by Mr. Justice Story long ago in Waters v. Merchants' Louisville Insurance Co., 11 Pet. 213, 221 (9 L. Ed. 691): 'There is nothing unreasonable, unjust, or inconsistent with public policy, in allowing the assured to insure himself against all losses from any perils not occasioned by his own personal fraud'."

In the above case limitation of liability was denied the assured under the statute, and judgment was rendered in favor of the assured. That because the record showed that the clause limiting the insurers' liability to losses occurring without the "fault or privity" of the assured was not contained in that policy, the majority opinion of the Fifth Circuit Court of Appeals herein considered that case inapplicable. But the reasoning given by that court, if applied, would have compelled a different interpretation given these policies, and one in accord with the parole testimony offered by petitioner herein.

Also in the case of *Sorenson v. Boston Ins. Co.*, 20 F. (2d) 640, cert. den. 275 U. S. 333, the Circuit Court of Appeals for the Fourth Circuit, as to a Protection and Indemnity policy, said:

> "The learned District Judge was of opinion that, even though in ordinary cases a warranty of seaworthiness might not be implied, so as to avoid a protection and indemnity policy, such policy would be avoided where unseaworthiness existed to the privity and knowledge of the assured. We do not think, however, that privity and knowledge has anything to do with the matter unless, as said in the case of Hanover Fire Ins. Co. v. Merchants' Transportation Company, supra, the privity and knowledge arose out of negligence so gross as to amount to a willful, deliberate, and intentional wrong. Negligence ordinarily will not defeat recovery under a policy of insurance; there must be either fraud or willful exposure to known danger. Orient Ins. Co. vs. Adams, 123 U. S. 67, 8 S. Ct. 68, 31 L. Ed. 63; Standard Marine Ins. Co. v. Nome Beach Lighterage & Transportation Co., (C. C. A. 9th) 133 F. 636, 1 L. R. A.

(N. S.) 1095. Such fraud or willful exposure to danger does not necessarily exist in the privity or knowledge of unseaworthiness which will defeat limitation of liability under the statutes relating thereto. While privity and knowledge have been spoken of as more than mere negligence, it is not meant by this that they embrace necessary any element of fraud or willful exposure to danger. What is meant is that in privity and knowledge there is fault or knowledge personal to the owner, as distinguished from the negligence or misconduct of his agents, employees, or co-owners, without his knowledge or participation. Craig v. Continental Ins. Co., 141 U. S. 638, 12 S. Ct. 97, 35 L. Ed. 886; Pendleton v. Benner Line, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770; Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 334, 39 S. Ct. 292, 63 L. Ed. 631; The Republic, (C. C. A. 2d) 61 F. 109; The Annie Faxon, (C. C. A. 9th), 75 F. 312; Great Lakes Towing Co. v. Mill Transportation Co., (C. C. A. 6th), 155 F. 11, 22 L. R. A. (N. S.) 769, 24 R. C. L. 1395; 36 Cyc. 417, 418.

"In the case at bar it is admitted that the lighter was unseaworthy with the privity and knowledge of the owner, but there is no admission or is there evidence to support the view that there was fraud or willful exposure to danger. On the contrary, the finding, as to privity and knowledge was based upon the failure of the superintendent to properly inspect the lighter, which had been lying light in hot weather, with the result that some of her seams had opened. There was entirely lacking any evidence of such fraud, design, or willful exposure to danger as would avoid the policy."

In the above case, limitation of liability under the statute (46 USCA 183) as in the preceding case, was denied the assured, but the assured therein recovered judgment on its Protection and Indemnity policy; but this latter case, the same as the preceding one, was not considered as applicable by the majority opinion of the Circuit Court herein, because the record therein showed that the clause, as herein involved, was not contained in the policy therein. However, the reasoning given therein for a Protection and Indemnity policy, as also given in the preceding case, was totally ignored by the majority opinion of the Circuit Court herein. That as said in the dissenting opinion of the Circuit Court in the instant case herein, that:

> "No contention is made in this case that the appellee was guilty of wanton or willful misconduct. So far as the record discloses the insured was honest and forthright in and about its business. At most it was guilty of simple negligence and bad judgment. For this dereliction this court has therefore decreed that it must pay out large sums for the loss of seamen who were on the tug. Now it is told by the majority opinion that since it was guilty of simple negligence and bad judgment it may not recover the amount of insurance carried on the vessel.
>
> "The essential purpose of the policy is to protect the owner from loss that may arise through negligence in connection with the operation of its business. The construction placed upon the contested clause by the majority opinion is too narrow and virtually destroys the effectiveness of the policy of insurance. It not only places the burden of proof on the insured but also precludes recovery where even simple negligence on the part of the shipowner is shown.

"I think the holding of the District Court was the correct one."

The interpretation given the policies herein, as stated in the said dissenting opinion:

"* * * virtually destroys the effectiveness of the policy of insurance."

The majority opinion herein in so interpreting the policies, and giving the words therein contained of "fault or privity" the same meaning as the words "privity or knowledge" under the statute (46 USCA 183), did not give effect to the fact that such policies were intended to indemnify against liabilities, and without negligence there would be no liability, and that there was not involved a public law, but a contract for an agreed money consideration.

The Limitation of Liability Statute R. S. §4283 (46 USCA 183) provides as follows:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Under this statute it has been held that the "privity or knowledge" does not have to be actual, but which may be imputed. In re: *Great Lakes Transit Corporation, Ltd. vs. Heussler* (C. C. A. 6) 81 F. (2d) 441; *Quinlan vs. Pew, et al.* (C. C. A. 1) 56 F. 111. In *The James Horan*, 10 F.

Supp. 28 aff. C. C. A. 3, 78 F. (2d) 870, the court therein denied the shipowner limitation of liability under the statute because of the privity or knowledge of an employee, a "pumpman" or "night watchman". Also in *Boston Towboat Company vs. Darrow-Mann Co.*, 276 F. 778 (C. C. A. 1), it was held:

> Privity or knowledge of the assistant manager of a towboat company, who though not an officer of the company, had the charge of management of its boats, of a custom of its barge masters to leave them unattended at night, while lying loaded in docks, held the privity or knowledge of the company.

Other citations can be cited to illustrate how far the courts have gone to hold a shipowner guilty of "privity or knowledge" under the statute, and therefore what little protection, if any, would Protection and Indemnity policies afford if the words "fault or privity" are to be given the same meaning as "privity or knowledge" under the statute.

The Limitation of Liability Statute (46 USCA 183) was passed granting to shipowners the right to limit their liability to "the amount or value of the interest of such owner in such vessel, and her freight then pending". And the object of a Protection and Indemnity policy "is to afford protection to shipowners, not afforded by the ordinary marine policy, and the contract should be construed with that object in view." *Hanover Fire Ins. Co. v. Merchants' Transportation Co., supra.*

The policies herein should be read in the light of the objects to be attained thereby. That as said by this Court in *South Chicago Coal & Dock Co. v. Bassett*, 84 L. ed.

488, in construing the application of the Jones Act to "any seaman":

> "Recently, in considering the application of the Jones Act to 'any seaman,' we adverted to the 'range of variation' in the use of the word 'crew', and it was again emphasized that what concerned us in that case, which had relation to the status of a 'master', was 'not the scope of the class of seamen at other times and in other contexts.' We said that our concern there was 'to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained.' Warner v. Goltra, 293 U. S. 155, 158, 79 L. ed. 254, 257, 55 S. Ct. 46.
>
> "That is our concern here in construing this particular statute—the Longshoremen's and Harbor Workers' Compensation Act—with appropriate regard to its distinctive aim. We find little aid in considering the use of the term 'crew' in other statutes having other purposes."

That as said in the dissenting opinion in the instant case:

> "* * * I think the oral testimony of qualified witnesses, such as was offered in this case; was admissible to show that the words 'fault or privity' have a recognized and well-understood meaning among underwriters and their customers, and that this characteristic meaning is different from the ordinary dictionary definition."

It would therefore appear that in construing the words "fault or privity" as contained in these policies, the aim and object of such a policy should be considered, and the meaning of such words, as used in the particular

form of policies involved, have in the insurance trade. And particularly in the instant case.

> "In examining, for the first time, any question under a policy of insurance, it is necessary to ascertain whether the contract has received a practical construction by merchants and underwriters." *General Mutual Ins. Co. v. Sherwood*, 14 How. 352.

That in considering that the District Court herein and one Circuit Judge reached different conclusions from the two other Circuit Judges constituting the Court, as to the meaning of the words relied upon by the insurer as exempting it of liability, the assured, petitioner herein, should have been given the benefit of the resulting doubt. The application of this doctrine is analagous to the decision of this Court in *Stroehmann v. Mutual Life Ins. Co.*, 300 U. S. 435, 81 L. ed. 732, wherein, on certiorari, this Court said:

> "Examination of the words relied upon to show an exception to the Incontestability clause of the policy discloses ample cause for doubt concerning their meaning. The arguments of counsel have emphasized the uncertainty. The District Court and the Circuit Court of Appeals reach different conclusions, and elsewhere there is diversity of opinion.
>
> "The District Court accepted the view approved in Ness v. Mutual L. Ins. Co., (Fourth Circuit) 70 F. (2d) 59, and Mutual L. Ins. Co. v. Markowitz, (Ninth Circuit) 78 F. (2d) 396, which presented for interpretation language identical with that now before us. The Circuit Court of Appeals followed its earlier opinion in New York L. Ins. Co. v. Gatti, (Oct. 6, 1936), where the company employed different language. Certain life companies undertake to make

exceptions to the Incontestability clause by words more precise than those now under consideration, and opinions in cases arising upon their policies must be appraised accordingly.

"Without difficulty respondent could have expressed in plain words the exception for which it now contends. It has failed, we think, so to do. *And applying the settled rule, the insured is entitled to the benefit of the resulting doubt.*

"The decree of the Circuit Court of Appeals must be reversed. The decree of the District Court is affirmed." (Italics ours.)

It is respectfully submitted that the question involved herein, the interpretation of such an important commercial contract as an insurance policy, and especially one issued for the protection of shipowners, is deserving of consideration of this Honorable Court. That especially so, since there is involved herein an equal split of opinion between four federal judges as to the rules of construction and interpretation of the policies herein, and since the Fifth Circuit Court of Appeals is in conflict with other Circuit Courts of Appeals as to the rules of construction of commercial contracts, a decision of this Honorable Court settling the matter involved herein would be very much welcomed, and of extreme importance to the commercial world, and in particular, to shipowners.

Respectfully submitted,

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EDWIN H. GRACE,
DANIEL H. GRACE,
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Counsel for Petitioner.

MAY 24 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 987.

SABINE TOWING COMPANY, INCORPORATED,

Petitioner,

versus

CONTINENTAL INSURANCE COMPANY, INCORPORATED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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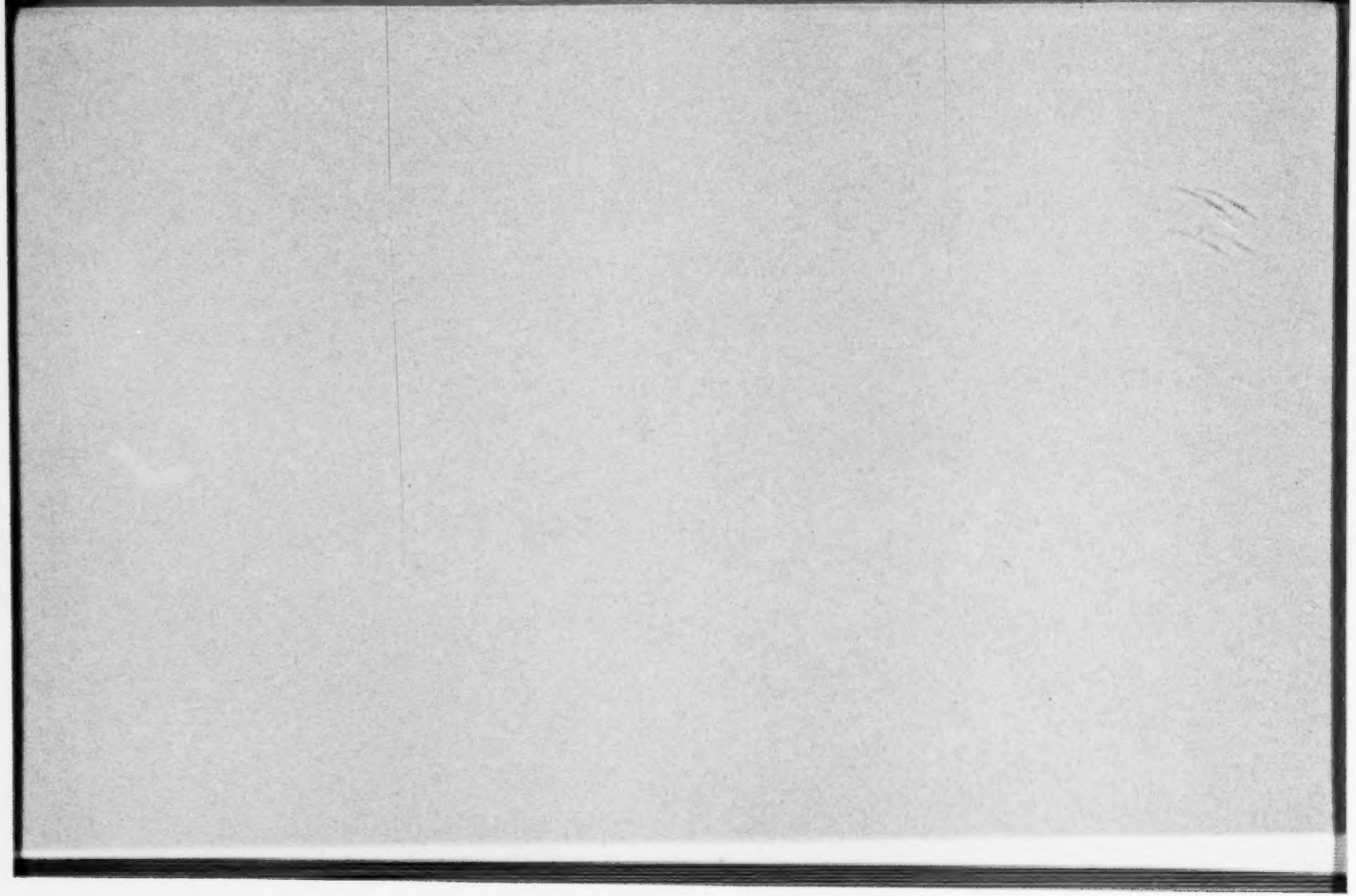

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versus

CONTINENTAL INSURANCE COMPANY, INCORPORATED,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Nature of the Case.

This case involves the construction of a contract of insurance which contained the following provision:

> "This Company hereby undertakes to make good to the Assured or the Assured's executors, administrators and/or assigns, all such loss and/or damage and/or expenses as the Assured shall, without fault or privity on the part of the Assured, become liable to pay and shall pay, * * *."

The petitioner asked both Courts below to rule as a matter of law that the words of limitation, "without fault

or privity on the part of the Assured," mean a deliberate, intentional or wrongful act or negligence so gross as to amount to such, that is, fraud. Petitioner also asked the Courts to admit parol evidence which it claimed proved that the words had that meaning in the insurance industry. The District Court ruled that the words had the meaning contended for by the petitioner, apparently relying upon the authority of three cases—*Moore* v. *Eagle Star & British Dominions Ins. Co.*, 5 Fed. (2d) 358, affd. 9 Fed. (2d) 296; *Hanover Fire Ins. Co.* vs. *Merchants Transport. Co.*, 15 Fed. (2d) 946, and *Sorenson* v. *Boston Ins. Co.*, 20 Fed. (2d) 640,—not realizing that the insuring clauses in the contracts under consideration in those cases did not contain the limiting phrase "without fault or privity on the part of the assured". The Circuit Court of Appeals held that that construction would amount to striking the words out of the policy entirely and parol evidence was not admissible to contradict the plain meaning of the contract, and that the parol evidence offered not only failed to prove a trade meaning of the words "fault or privity", but proved that there was no such trade meaning.

The Reasons Assigned by Petitioner For Granting a Writ.

The petitioner claims:

1. There is a conflict between the decision of the Circuit Court of Appeals and other Circuits on the question of the application of the parol evidence rule; and

2. The question involved is of public importance.

The Circuit Court of Appeals Correctly Interpreted the Contract of Insurance.

The petitioner practically urges the striking out of the contract the words "without fault or privity on the part of the Assured".

In *The Morro Castle* (*New York & Cuba Mail S. S. Co. v. Continental Ins. Co.*), 32 Fed. Supp. 251, 257, Judge Goddard after referring to the cases cited by the petitioner herein to support its contention, said:

> "* * * these cases involve suits on 'all risk' policies, in which the rule of law is that the vessel owner cannot recover on the policy if some act of his which contributed to the loss was wilfully and grossly negligent. * * *"

The Circuit Court of Appeals for the Second Circuit agreed with Judge Goddard in his interpretation of the contract (117 Fed. (2d) 404) but reversed him on other grounds.

The Circuit Court of Appeals in this case said:

> "Appellee's reliance on the Federal cases it cites will not do, for those were suits on protection and indemnity policies providing general coverage and containing no clause such as that found in these policies limiting the insurer's liability to losses occurring without the fault or privity of the assured. *Cf. The Morro Castle,* 32 Fed. Supp. 251. Their holdings that, even under such open policies, no recovery could be had where the loss was the result of willful, deliberate or intentional acts or of negligence so gross as to amount to this, the result in short of *dolus malus* or wrongdoing, but emphasize, as do the holdings of the English courts, the correctness of

> appellant's position, that the insertion in the policy of the words 'without privity or fault of the assured' was with purpose and effect, and that a policy containing these limiting terms should not be construed as are policies not containing them. For such a construction giving no effect whatever to the limitation, would in effect write it out of the policy. But this is not all, for while we have been referred to no cases construing these words when used in a policy, there are, as we have seen in the notes, *supra,* cases in abundance construing them when used in statutes, both English and American. * * *."

Petitioner states on page 27 of its brief, in reference to the *Hanover* case, *supra*:

> "* * * That because the record showed that the clause limiting insurer's liability to losses occurring without the 'fault or privity' of the assured was not contained in that policy, the majority opinion of the Fifth Circuit Court of Appeals herein considered that case inapplicable. But the reasoning given by that court, if applied, would have compelled a different interpretation given these policies, and one in accord with the parol testimony offered by petitioner herein."

This is a plain *non-sequitur.*

In reference to *Sorenson* v. *Boston Insurance Co., supra,* petitioner states (p. 29):

> "* * * this latter case, the same as the preceding one, was not considered as applicable by the majority opinion of the Circuit Court herein, because the record therein showed that the clause, as herein involved, was not contained in the policy therein. However, the reasoning given therein for a Protection and Indemnity policy, as also given in the pre-

> ceding case, was totally ignored by the majority opinion of the Circuit Court herein."

The petitioner asks this Court to give all marine insurance contracts dealing with P. & I. risks the same construction, regardless of the language of the contracts themselves.

There is no conflict between the decision of the Circuit Court of Appeals and the decisions relied upon by the petitioner in its brief to show such conflict.

Peters v. *Warren Insurance Co.*, 14 Peters 99, did not involve any parol testimony. It is merely a case of the construction of the contract of insurance on legal principles.

In *E. I DuPont de Nemours & Co.* v. *Claiborne-Reno Co.*, 64 Fed. (2d) 224, the full quotation of the paragraph from which petitioner quotes shows clearly that that case has no application.

> "Contracts are ordinarily to be performed by business men, and should be given the interpretation which would be placed upon them by the business world. *Where one corporation presents to another corporation a form of agreement reciting, 'It is understood and agreed that this contract is entered into upon the following conditions: That it is our intention and desire to continue under this agreement so long as your services, in our judgment, prove satisfactory,' we have no doubt that such language would ordinarily be understood to mean a promise to continue until dissatisfied.*" (Italics represents part not quoted by petitioner.)

Daniel v. *Pappas*, 16 Fed. (2d) 880, involved a question of the meaning of the term "confectionery store purposes" in a lease of real estate in the City of Tulsa, Oklahoma, and

the question was, "What is included in the term 'confectionery store purposes' "?

The Court said:

> "* * * The evidence showed that it had become the established custom at the time the lease in question was entered into in Tulsa and vicinity for confectionery stores to serve lunches. In employing the language 'confectionery store purposes' the parties no doubt had in mind the business usually and ordinarily conducted in a confectionery store."

This is a situation far different from what we have.

In *Western Petroleum Company* v. *Tidal Gasoline Company,* 284 Fed. 82, a contract contained this phrase:

> "The price per wine gallon of said gasoline shall be three and one-half (3½) cents in buyer's cars, under the Standard Oil Company's tank wagon price, f.o.b. point of delivery * * * Chicago market."

Parol evidence was admitted to prove the "tank wagon price". Witnesses were permitted to testify that "tank wagon price" was understood by the industry to mean

> "* * * the announced price or basic price fixed by the Standard Oil Company of Indiana, at which the industry bought and sold gasoline."

The Court pointed out (84):

> "A usage, in order to change the plain import of language must be general, certain, uniform and of sufficient duration to justify an inference that the parties had it in view in making their contract."

The Circuit Court of Appeals followed the rule long established in the English courts, and adopted by this Court, for the construction of contracts of insurance.

Home Insurance Company v. *Baltimore Warehouse Company,* 93 U. S. 527, 23 L. Ed. 868.

> "* * * It is as true of policies of insurance as it is of other contracts that, except when the language is ambiguous, the intention of the parties is to be gathered from the policies alone. * * *."

Grace v. *American Central Ins. Co.,* 109 U. S. 278, 27 L. Ed. 932.

> "* * * In *Barnard* v. *Kellogg,* 10 Wall., 383 [77 U. S. XIX., 987], this court quotes with approval the language of *Lord* Lyndhurst in *Blackett* v. *Royal Exchange Assur. Co.,* 2 Cromp. & J., 249, that 'Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.' * * *"

Bergholm v. *Peoria Life Ins. Co.,* 284 U. S. 489, 76 L. Ed. 416.

> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense. * * *."

There is no conflict between the decision of the Circuit Court of Appeals in this case and the decisions of this Court or of any of the other Circuit Courts of Appeals. Furthermore, the Circuit Court of Appeals found that the evidence did not

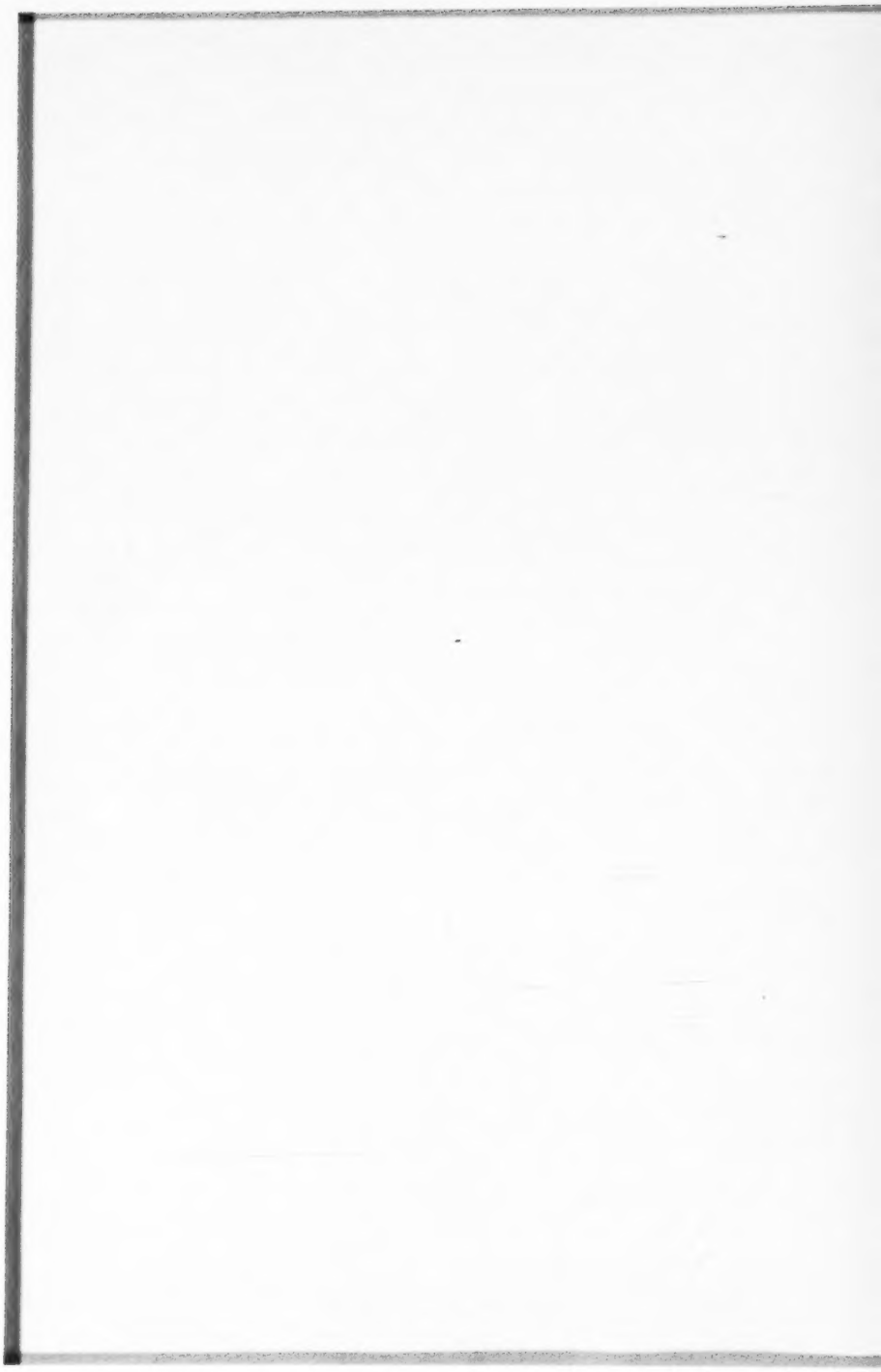
> "* * * show a universal trade custom or usage sufficient to overcome the plain meaning of words in the policy, it negatives the existence of such trade usage or custom."

The same evidence was presented in *The Morro Castle, supra,* in New York through two of the same witnesses, LaBoyteaux and Sullivan. It was disregarded by Judge Goddard, no error was assigned on this point, and it was not urged in the Circuit Court of Appeals.

The decision of the Circuit Court of Appeals is correct and is not in conflict with that of any other Circuit or of this Court. The question is not of any general importance because if the parties do not like the contract as construed by the Court they can procure another type of contract.

Respectfully submitted,

ARTHUR M. BOAL,
H. C. HUGHES,
Attorneys for Respondent.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 987

SABINE TOWING COMPANY, INCORPORATED,
Petitioner,

vs.

CONTINENTAL INSURANCE COMPANY,
INCORPORATED.

REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF OPPOSING PETITION.

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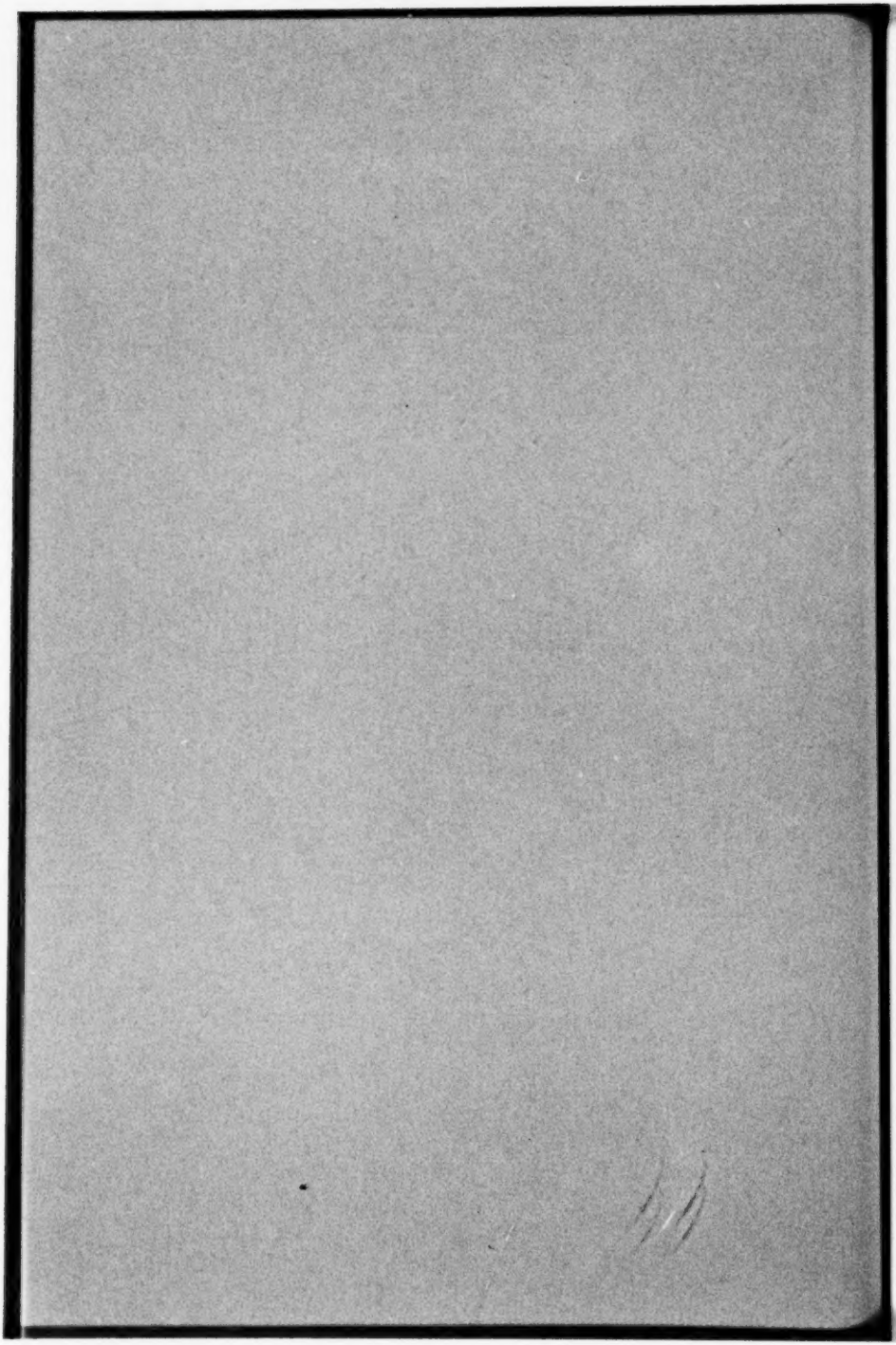

SUPREME COURT OF THE UNITED STATES

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SABINE TOWING COMPANY, INCORPORATED,
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vs.

CONTINENTAL INSURANCE COMPANY, INCORPORATED,
Respondent.

REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF OPPOSING PETITION.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Sabine Towing Company, Inc., respectfully submits the following comments in reply to respondent's brief in opposition.

Petitioner in the petition for writ of certiorari has fully set out the questions involved herein, all questions of law. It is not, therefore, the purpose to here again discuss these questions, other than to point out that a reading of the first two pages of the brief in opposition wherein respondent purports to state the questions involved and the reasons "assigned by petitioner" for granting the writ not only

does not give an appreciation thereof, but tends to confuse same.

Since filing the petition for writ of certiorari herein, and on Monday, May 26, 1941, this Honorable Court entered an order denying a petition for writ of certiorari in cause No. 988, New York and Cuba Mail Steamship Company, petitioner, against The Continental Insurance Company, of the City of New York, respondent. The respondent in that case is respondent here. That suit is also a suit on a protection and indemnity policy and is referred to in the instant case in the court below and in briefs of the respective parties, as the *Moro Castle* case. In that case the District Court of New York allowed recovery under the policy. On appeal the United States Circuit Court of Appeals reversed the District Court. From this decision of reversal the libellant appellee in the court below made application for writ of certiorari and which, as stated, was denied.

The reference made to that case by petitioner herein was with respect to what was said by the Circuit Court of Appeals in that case and wherein, in referring to the words "actual fault or privity" as used in the *Moro Castle* policy and the words "privity or knowledge" as used in the statute stated:

> "* * * the analogy between the statutory provision for limited liability and a contract by a paid insurer to relieve the promisee of loss should not be pressed too far."

This language was referred to by petitioner in comparison with what was stated by the Circuit Court of Appeals in the instant case, wherein referring to the words "fault or privity" of the policy herein, and privity or knowledge of the statute said:

> "We think it has the same meaning and effect when used in the policy in suit."

and with what was said by Circuit Judge McCord in dissenting from the majority court in the instant case.

> "The words 'fault or privity' as used in the policy of insurance should not be limited to the interpretation placed upon similar language used in the American and English Limitation of Liability Statutes."

The *Moro Castle* case differs from the instant case in a number of respects among which we refer to the following. It was a suit in admiralty. The instant case was a suit at law, with a jury waived. On appeal in admiralty the *Moro Castle* case was a trial *de novo*. That case as stated in brief in opposition "* * * involves mainly questions of fact." In reply brief of petitioner in the *Moro Castle* case, it was stated with respect to the findings of fact of the District Court, "those findings were entitled to respect, but were substantially disregarded by the Circuit Court of Appeals * * *" In the instant case, questions of law alone are involved. It is not urged in the brief in opposition filed herein that this case involves questions of fact. In the *Moro Castle* case and as stated in the opinion of the Circuit Court of Appeals, "Libellant admitted that the officers and crew of the ship were guilty of various infractions of the Safety at Sea statutes and regulations," and further stated "on all the evidence we think that was such actual fault or privity of the libellant in the violation of safety statutes as to take the loss outside the scope of the policy." In the opinion, the court further says, "the words of the policy here go somewhat beyond the limitation statute in that they expressly except liability which arises only from the neglect of the assured, or the managing officers of its organization. Torresson neglect here was a neglect of libellant which is inexcusable where dangers at sea are involved and which excludes liability upon the policy." And

further says, "All these offenses were serious, flagrant and long continued." In the *Moro Castle* case the libellant and its vice president had been convicted of violating the criminal statutes with respect to "loss of life by misconduct of officers of vessel; liability of corporation and officers 18 U. S. C. A. Sec. 461.

The policy in the *Moro Castle* case, in addition to containing a privity clause also contained a clause relieving the underwriter from liability "for any loss, damage or expense to which the assured or the managing officers of his organization are privy, or which arises from his or their act or neglect." This clause as to fault or neglect is not contained in the policy in the instant case.

In the instant case, and as pointed out in the petition for writ of certiorari, the petitioner was acting in good faith throughout and the fault found, and on which it was denied the right to limit its liability was imputed to petitioner.

If the negligence found in the instant case had been found to be wilful, deliberate or intentional, or so gross as to amount to that (but it was not so found), the loss would not be one covered by the policy. In the *Moro Castle* case the negligence found could be so considered. The decision rests on the particular facts therein before the Court.

The United States Circuit Court of Appeals in its majority opinion in reversing the lower court did not do so because of any different view as to the facts, but on the ground that petitioner (acting in good faith) was denied the right to limit its statutory liability because of a finding of privity or knowledge, that this finding, as a matter of law, barred recovery by petitioner herein in a subsequent suit, the instant case, on the policy containing the words "fault or privity." The majority courts holding that the words fault or privity as used in the policy had the same meaning as privity or knowledge, as used in the statute,

and that parol evidence of insurance men, to the effect that as used in the insurance world they had a different meaning—the meaning attributed to them by the District Court was inadmissible.

It is respectfully submitted that the writ should be granted.

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